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RE:

## **DRAFT EIS: Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead**

This comment is regarding the Draft Environmental Impact Statement (DEIS) prepared by the Bureau of Reclamation (Reclamation) for the Secretary of the United States Department of the Interior (Secretary) in support of a proposal to adopt specific interim guidelines for the Colorado River Lower Basin (Lower Basin) shortages and coordinated operations for Lake Powell and Lake Mead, particularly under drought and low reservoir conditions. The bulk of these comments are related to how the Interim Shortage Guidelines (ISG) will affect the Navajo Nation.

## **SUMMARY of COMMENTS**

In general the DEIS fails

- (1) to include the Upper Basin usage or Management into the any of the plans; the Final Environmental Impact Statement should be a programmatic EIS that includes the shortage plan for the entire basin so that the shortage can be equally shared across all stakeholders;
- (2) to address the issue of Federal Indian Reserve Water Rights particularly the lack of adequate culinary water available to members of the Navajo Nation;
- (3) to address the storage capabilities of CAP, the MWD Aquaduct, and the alternatives of using aquifers for storage to reduce the evaporative loss in the reservoirs; and
- (4) to include contingencies to react to actual global warming projections.

## Background of the Navajo Nation

The Navajo Nation includes the largest geographic area of any reservation in the United States.<sup>1</sup> The reservation is approximately 27,000 square miles.<sup>2</sup> As of the year 2000 census there are currently 298,215 members of the Navajo Nation, of which an estimated 173,987 currently live within the Navajo Nation reservation.<sup>3</sup> The majority of the Navajo Nation is geographically located in the Lower Basin state of Arizona. However, there are portions of the Navajo Nation in New Mexico and Utah. As of the 2000 census 63,500 members of the Navajo Nation were without domestic culinary water in their homes and had to haul water from community wells.<sup>4</sup> Additionally, the Navajo Nation will likely continue a transition from livestock herding to an agricultural based economy. In order to meet the future demands of the Navajo Nation a substantial quantity of water will be required.

The Supreme Court recently decreed in the Consolidated Decree that the Colorado River Indian Reservation, located in Arizona and California, had a prior perfected right to 662,402 acre feet (af) of Lower Basin.<sup>5</sup> This allocation is based on water that can be diverted and put to a consumptive use on the reservation.<sup>6</sup> However, the Decree does not actually restrict the use to which that water can be applied, so long as it is a beneficial use under the meaning in the decree.<sup>7</sup> Additionally, under the Consolidated Decree allocations to the tribes are charged to the state within which the consumptive use is made.<sup>8</sup> Although, there are members of the Navajo Nation homesteading on the Colorado River Indian Reservation, the bulk of the Nation's

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<sup>1</sup> <http://www.census.gov/population/www/cen2000/phc-t18.html> [last checked 15 April 2007]

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> <http://www.freewmexican.com/news/57909.html> [last checked 15 April 2007]

<sup>5</sup> *AZ v. CA*, 547 U.S. 150, 126 S.Ct. 1543 (2006)

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

members remain within the Navajo Nation reservation. Unfortunately, the Consolidated Decree does not identify an apportionment from the Lower Basin's apportionment to the Navajo Nation.

Approximately one third of the Navajo Nation reservation is in the state of New Mexico. The fact that the Navajo Nation is split between states and between the Upper and Lower Basins has severely complicated any claims by the Navajo Nation for water. Although Congress granted the Navajo Nation 508,000 af of Upper Basin water in the Navajo Indian irrigation project, the Navajo Nation has never realized that amount.<sup>9</sup> Instead, after decades of litigation and controversy, the Navajo Nation has agreed to settle with the State of New Mexico for 56% of New Mexico's entire allocation and with priority dates starting in 1868.<sup>10</sup> However, that settlement is still pending congressional approval. Furthermore, only one third of the Navajo Nation will be serviced from the water in the settlement if it is approved.

The balance of the Navajo Nation is in Arizona, 18,119.2 square miles, and Utah. The Navajo Nation has the right to demand sufficient water to put the all of the irrigable land on the reservation to a beneficial use. Unfortunately, the amount of irrigable land is still heavily contested. There are 11,601,856 acres of Navajo Nation Land within Arizona, under the precedent in the Consolidated Decree the Navajo Nation could claim an average of 6 af per irrigable acre on the reservation.<sup>11</sup> Under the Law of the River the water would be charged against Arizona's allocation. Furthermore, the Consolidated Decree has determined that anywhere between thirty and seventy percent of a tribe's reservation may be irrigable.<sup>12</sup> However, Public Law (87-483) designated 110,630 acres of the Navajo Nation reservation

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<sup>9</sup> Navajo Indian Irrigation Project, Public Law 87-483, (1962).

<sup>10</sup> *New Mexico v. U.S.*, CIV. 75-418. See THE SAN JUAN RIVER BASIN IN NEW MEXICO NAVAJO NATION WATER RIGHTS SETTLEMENT, April 19, 2005.

<sup>11</sup> *AZ v. CA*, 547 U.S. 150, 126 S.Ct. 1543

<sup>12</sup> *Id.*

located in New Mexico as irrigable, or roughly, two percent, a more realistic number when looking at the Navajo Nation.<sup>13</sup> Therefore, if the Navajo Nation can prove that 232,037 of the total reservation in Arizona is irrigable then the Navajo Nation could claim as much as 1.4 maf, or approximately one half of Arizona's total apportionment under the BCPA.<sup>14</sup>

## **COMMENTS**

### ***FACT SHEET***

1. The Fact Sheet states that four action alternatives and a no-action alternative are included in the DEIS. Additionally, the Fact Sheet states that two of the four action alternatives were developed based on comments from parties outside the Bureau of Reclamations. Please identify the cooperating agencies, stakeholders, and other interested parties that are mentioned as providing input for the two action alternatives. Other stakeholders and interested parties would be more likely to provide meaningful input into the DEIS if it was clear who had already participated in the drafting process.

2. The Fact Sheet also states that the purposes of the proposed federal actions are to: (1) improve Reclamation's management of the Colorado River by considering the tradeoffs between the frequency and magnitude of reductions of water deliveries, and considering the effects on water storage in Lake Powell and Lake Mead, water supply, power production, recreation, and other environmental resources; 2) provide mainstream U.S. users of Colorado River water, particularly those in the Lower Division states, a greater degree of predictability with respect to the amount of annual water deliveries in future years, particularly under drought and low reservoir conditions; and, 3) provide additional mechanisms for the storage and delivery of water supplies in Lake Mead. With the increase in demand on water use projected in the Upper Basin

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<sup>13</sup> Navajo Indian Irrigation Project, Public Law 87-483, (1962).

<sup>14</sup> Boulder Canyon Project Act of 1928

states and pending determinations of Tribal reserve water rights, the purpose should include identification and resolution of those issues to avoid future conflicts during times of drought.

## **CHAPTER 1: PURPOSE AND NEED**

1. Section 1.3 Purpose of and Need for Action. The DEIS statements for the need for action fail to mention anything about the known effects of climate change on the future supply of water for the Colorado River Basin. The harms associated with global climate change were recently recognized in by the Supreme Court in *Massachusetts v. EPA*.<sup>15</sup> Among the known harms that will directly affect any shortage plan in the Colorado River Basins is a significant reduction in winter snowpack in the Rocky Mountains.<sup>16</sup>

2. Additionally, Section 1.3 fails to account for the recent 9<sup>th</sup> Circuit decision that vacated an injunction against lining the All American Canal to reduce seepage into Mexico.<sup>17</sup> Under the *Mexicali* decision the seepage water that currently enters Mexico from the canal will be reclaimed for use in the Imperial Valley Irrigation District. This will further reduce the amount of water that enters Mexico to meet treaty obligations.<sup>18</sup> Although it was assumed that this seepage water was not part of the treaty allocation it has become relied upon by Mexico and will have to be replaced from another source in the Lower Basin. Additionally, where the seepage has replaced the in-stream flows into Mexico it may have the original priority date set by the treaty of 1944.<sup>19</sup>

3. Section 1.5.1 Affected Region and Interests: limits the scope of the DEIS to the Lower Basin. It is well documented that there is a hydrological nexus between the Upper and Lower

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<sup>15</sup> *Massachusetts v. EPA*. 2007 WL957332 (U.S.)

<sup>16</sup> *Id.* at 12-17

<sup>17</sup> *Consejo de Desarrollo Economico de Mexicali, A.C. v. U.S.* 2007 WL1054271 (9th Cir(Nev.)).

<sup>18</sup> *Id.*

<sup>19</sup> See Treaty Between the United States of America & Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande ["1944 Treaty"], 59 Stat. 1219, T.S. No. 994, Section III, Art. 10 (Nov. 8, 1945).

Basin States.<sup>20</sup> If the interim guidelines for Lower Basin shortage operations are based on the assumption that a minimum of 8.23 maf of water will be available for release annually from Glen Canyon Dam then the affected region includes all of the Upper Basin states. Under current and future projected precipitation the total per annum flow through the basin is, and will continue to be, less than 15 maf.<sup>21</sup>

## **CHAPTER 2: DESCRIPTION OF ALTERNATIVES**

1. Section 2.1 Development of Alternatives: Although there is discussion of encouraging conservation under one of the four action alternatives, there is no inter-basin strategy to reduce demand for water resources through an increased emphasis on conservation. With a growing demand and diminishing supply the Conservation Before Shortage Alternative is the only alternative that realistically attempts to address the larger problem. However, without an inter-basin coordinated management alternative any savings realized in the Lower Basin will be lost to the ever decreasing supply available from the Upper Basin. Furthermore, all published alternatives require an unrealistic minimum annual inter-basin transfer of 8.23 maf through Lee's Ferry and follow the same Shortage priority
2. Section 2.2.1 Shortage Guidelines: The DEIS discusses the Secretary's current options under the Law of the River as placing California's claims ahead of Arizona. In effect, under this interpretation, California would not incur a shortage until all Arizona post 1968 contracts were reduced completely, including the Central Arizona Project. However, there is no discussion of allocation to the tribes and specifically the Navajo Nation during a shortage. The Navajo Nation

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<sup>20</sup> See generally, Pontius, Dale, Colorado River Basin Study: Report to the Western Water Policy Review Advisory Commission, <http://hdl.handle.net/1928/2782> (1997)

<sup>21</sup> See Niklas S. Christensen, *The Effects of Climate Change on the Hydrology and Water Resources of the Colorado River Basin*, Climatic Change 62: 337-363 (Kluwer Academic Publishing, Netherlands, 2004).

has a water right as of September 9, 1850.<sup>22</sup> Under the *Winters' Doctrine* the Supreme Court recognized the water rights of the tribes as the time that the reservation was created under the treaty.<sup>23</sup> Additionally, the Supreme Court quantified the right as an amount sufficient to make use of the reserved land in the manner for which they are reserved.<sup>24</sup> However, the actual acre feet reserved to the Navajo Nation has yet to be determined. Any interim or long term shortage strategy must include an accurate accounting of the water available to the Upper and Lower Basin states after the prior perfected rights are quantified and apportioned. Finally, in 1922 the Colorado River Compact solidified that the Indian reserve water rights were not to be affected by the Compact or later statutes or decisions.<sup>25</sup>

### **CHAPTER 3: AFFECTED ENVIRONMENT**

1. Section 3.4.1 Apportionments to Upper Basin States: explains the apportionment to the Upper Basin states by percentage. Appendix C includes a depletion schedule projected through 2060 based on current and projected uses. Section 3.2.1.1 identifies that the Navajo Nation is riparian to a portion of Reach 1 defined as Gypsum Canyon to Glen Canyon Dam. Section 3.3.2 Lake Powell and Glen Canyon Dam: states that the Navajo Generating Station takes water directly from the Lake Powell for use as cooling water. The depletion schedule in Appendix C limits use within Arizona to 50 kaf. The amount currently used by the Navajo Generating Station is 34,100 af. The balance of the 50 kaf is already allocated to beneficial uses within the portion of the Navajo Nation in the Upper Basin. The Navajo Nation has agreed not to make demands additional demands against Arizona's Upper Basin apportionment greater than 50 kaf

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<sup>22</sup> 9 Stat. 974.

<sup>23</sup> *Winters v. United States*, 207 U.S. 564 (1908)

<sup>24</sup> *Arizona v. California*, 373 U.S. 546, 600 (1963).

<sup>25</sup> See article 4(a), Colorado River Compact (St. Cal. 1929, p. 4).

before 2018.<sup>26</sup> However, this amount does not account for the total prior perfected right of the Navajo Nation in the Upper or Lower Basin.

## **CHAPTER 4: ENVIRONMENTAL CONSEQUENCES**

1. Section 4.15 Environmental Justice: explains the methodology and consequences of the ISG on the 9 identified Environmental Justice counties within the Lower Basin states. Because the alternatives all follow the same priority for reductions in deliveries to the respective water users there is no significant difference to the environmental justice communities under any alternative. However, Executive Order 12898 directs agencies to identify and address, as appropriate, disproportionately high and adverse human health and environmental impacts of their programs, policies, and activities on minority and low-income populations.<sup>27</sup> The tribes have historically been left out of the discussions regarding allocations of water throughout the basin. Any plan that does not take into account the Indian reserve water rights, and specifically the reserve water rights of the Navajo Nation, will ultimately have a disproportionately high and adverse impact on the low-income populations on the reservations. By failing to identify and secure the water rights of the Navajo Nation now the agency is effectively maintaining the status-quo by allowing junior water-rights holders to continue to appropriate water ahead of their priority date. Additionally, the longer the agency waits to rule on the quantity due to the Navajo Nation the more severe the impact and the greater the estoppel argument against the prior perfected rights of the Navajo Nation. Without a final decision the junior appropriators are far more likely to continue to litigate the matter as long as they can and are allowed to use the water during litigation. The ISG should take into account the amount of water that the Navajo Nation can put to a beneficial use on the existing reservations.

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<sup>26</sup> See Navajo Nation Council Resolution CD-108-68.

<sup>27</sup> Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, **59 FR 7629 (1994)**.



## **CONCLUSION**

None of the proposed alternatives have significant differences to environmental impacts or on environmental justice issues. There are no alternatives relating to the actual significant government action that is affecting the human environment, specifically the Interim Shortage Guidelines and the priority of imposing shortages is the substantially the same in each alternative. Essentially, all of the current alternatives follow the same shortage sharing modeling assumptions. The ISG then imposes shortages in the same priority without any regard for the actual quantity of available water after consideration of the Federal Reserve Indian Water rights of the Navajo Nation. Finally, the Scope of the Environmental Impact Statement needs to be reevaluated to adequately address the effects of the ISG on minority and low-income populations that stand to be affected by the Federal Action in accordance with EO 12898.

Respectfully yours,

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